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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 853.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER,

*v.*

PHILIP J. ARONSON, TRUSTEE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

### OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 10) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 59) is reported in 87 F. (2d) 272.

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 5, 1937. The petition for a writ of certiorari was filed on April 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED.

The sole question presented on the record in the case at bar is whether the Circuit Court of Appeals erred in holding that the particular articles manufactured and sold by the Viking Manufacturing Company, Inc., namely, jig saw picture puzzles, were not taxable as "games and parts of games" under Section 609 of the Revenue Act of 1932.

## STATUTE AND REGULATIONS INVOLVED.

Revenue Act of 1932, c. 209, 47 Stat. 169:

> "SEC. 609. TAX ON SPORTING GOODS.
>
> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." (U. S. C., Title 26, c. 20B, p. 1186.) (Italics ours.)

Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602–611, inclusive, 613 and 614 of the Revenue Act of 1932, promulgated

by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on June 18, 1932, contained the following provisions with respect to this tax:

"ART. 53. SCOPE OF TAX.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as* sporting goods, *games, and parts of games* (except playing cards and children's toys and games). (Italics ours.)

. . . . . .

"The term 'game' includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, etc.

. . . . . .

"ART. 56. ARTICLES NOT SUBJECT TO TAX.—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars and similar articles, are not subject to tax as sporting goods or "games."

. . . . . .

STATEMENT.

Supplementing the statement of the petitioner, the following facts should be called to the attention of the Court:

Jig saw puzzles and picture puzzles of the jig saw type have been manufactured since the early part of the Nineteenth Century and perhaps as early as the American Revolution (R. 16). The unanimous opinion of experts and of manufacturers and distributors of both games and jig saw puzzles is to the effect that a jig saw puzzle or picture puzzle of the jig saw type is not a game (R. 15, 23, 25, 29, 35). In the terminology of the trade a jig saw puzzle is not a game (R. 15, 23). The word "game", in its trade signification, means articles or instrumentalities employed in a contest between two or more persons according to a set of rules, where there is competition, an uncertain outcome and a winner and loser (R. 16, 23, 25, 31, 35). It appears that this is the sense in which the word was used in Article 55 of Regulations 46 (p. 3, *supra*) since all of the articles therein named are obviously designed for use in such a contest. There are no rules, however, for the solution of a jig saw puzzle (R. 16, 26). The word "game", in the terminology of the trade, never includes either puzzles or toys, all three constituting separate and distinct types or categories of amusement devices (R. 15, 24).

Children are at least as adept as adults in solving jig saw puzzles and sometimes they are rather smarter than their parents in doing them (R. 16, 26, 36). Children can solve picture puzzles in excess of 50 pieces (R. 16, 26) and the puzzles manufactured by the Viking Manufacturing Company, Inc., were as readily soluble

by children as by adults. Even the 162 piece puzzle was too easy for children (R. 27, 30).

From February 25, 1919, to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as games under the provisions of Section 900 (5) of the Revenue Act of 1918 (R. 19). On August 26, 1932, the Commissioner made an unpublished ruling that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932 (R. 20). This ruling was reversed on February 7, 1933, the ruling being given prospective operation only (Deft's Ex. A, R. 39). On April 20, 1933, the ruling of February 7 was again reversed in part, the tax being given retroactive effect to puzzles made on or after June 21, 1932 (Deft's Ex. B, R. 40). No tax was assessed or collected with respect to sales of jig saw or picture puzzles prior to the ruling of the Bureau of Internal Revenue in S. T. 567, published on November 14, 1932 (R. 19, 41).

## ARGUMENT.

### I. THE DECISION IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISION IN BALTIMORE TALKING BOARD CO. v. MILES, 280 FED. 658, CERTIORARI DENIED, 259 U. S. 587.

The actual decision in the case at bar is that the *jig saw picture puzzles* in question are not included within the phrase "games and parts of games" as used in Section 609 of the Revenue Act of 1932. In the case of *Baltimore Talking Board Co.* v. *Miles, supra,* it was held that the articles there in question, known as *ouija boards,* were taxable as games under Section 900 (5) of the Revenue Act of 1918.

It is submitted that a comparison of the facts involved in the ouija board case, so called, with those in the case at bar establishes beyond a doubt that the two articles are entirely different and that the decisions in both cases are in complete harmony.

In that case the decision that a ouija board was taxable as a game was clearly based upon the fact that the taxpayer had obtained a patent which described the article as follows (p. 660):

> "The object of the invention is to produce *a game with which two or more persons can amuse themselves* by asking questions and having them answered by the device used and operated by the touch of the hand, so that the answers are designated by the letters of the alphabet." (Italics ours.)

In that case, moreover, the defendant introduced into evidence certain envelopes, boxes and boards which contained printed directions for operating the board.

The basis of the decision in that case is disclosed in the following language of the Court (pp. 661, 662):

> "In view of the comprehensive scope of the Revenue Act, the common knowledge that the ouija board is so generally used as a means of amusement, *the fact that the Patent Office issued a patent describing it as a game,* the presumption that the revenue officers correctly found *it was so used* after investigation, *and the absence of any testimony to the contrary,* we think the finding of the District Judge had adequate support in the testimony and therefore cannot be reversed by this Court." (Italics ours.)

No extended argument is necessary to show the complete absence of similarity between the ouija board and the jig saw picture puzzles here in controversy. In that case the taxpayer had obtained a patent which described the article as a game. The article in the case at bar, however, was not so patented. There the article was accompanied with printed directions for its operation. In the instant case the uncontradicted testimony in the record discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26). There the record disclosed no testimony that the article was not a game. In the case at bar the overwhelming and undisputed testimony establishes the fact that a jig saw puzzle or picture puzzle of the jig saw type is not a game. As the Circuit Court of Appeals pointed out in its opinion (R. 61) the particular article here sought to be taxed is a puzzle, which is defined as "a contrivance designed for testing ingenuity". Obviously the ouija board is not such a contrivance and therefore bears no similarity to the article in controversy.

The question whether an article is or is not subject to tax under the particular statute involved is always a question of identification. *Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321, 322. As the Court said in that case (p. 322):

> ". . . the test is whether the 'article' attempted to be taxed is the 'article' upon which the tax has been imposed by law."

It is accordingly submitted that there is no conflict of decisions.

## II. THE REASONING OF THE COURT IN BALTIMORE TALKING BOARD CO. v. MILES, SUPRA, DOES NOT CONFLICT WITH THE REASONING OF THE COURT IN THE CASE AT BAR.

Not only is there no conflict of decisions in the instant case, but it is submitted that even the reasoning in the opinions of the two Courts is reconcilable when the language of the Court in the ouija board case is properly analyzed.

It is true that the Court said in that case (p. 661):

> "The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries; that is, articles not reasonably necessary to comfort according to the average standards of American life . . ."

This statement of the Court, however, did not have specific reference to the phrase "games and parts of games" in Section 900 (5) of the 1918 Act, but was directed to Section 900 in its entirety. This section, in addition to sporting goods and games, imposed a tax upon a wide variety of luxuries named in its twenty-one subdivisions, including such articles as automobiles, automobile parts and accessories, musical instruments, chewing gum, candy, films, firearms, hunting knives and garments, electric fans, thermos bottles, smoker's articles, slot machines, liveries, fur goods, pleasure boats and toilet soaps. Unquestionably none of these articles may be called a necessity. It seems obvious that the Court could not have meant that *all* luxuries were taxable under the statute since

it expressly stated that the intention was disclosed to tax sales of *"all articles which were thought of and named"*. It is therefore submitted that the above quoted language does not and was not intended to define the scope of the phrase "games and part of games" and that accordingly there is not even a conflict or difference in the reasoning of the two cases.

Even assuming, however, that there is such a conflict in reasoning, which the respondent contends does not exist, it is respectfully submitted that a conflict or difference in reasoning is not a conflict of decisions so as to warrant the granting of the petition in the case at bar.

### III. THE DECISION OF THE COURT IN THE CASE AT BAR IS CORRECT.

Notwithstanding the general finding of the trial Court for the petitioner, the record presented to the Circuit Court of Appeals the question whether, as a matter of statutory construction, the phrase "games and parts of games" in Section 609 of the Revenue Act of 1932 included within its scope the articles in question. The construction adopted by the Circuit Court of Appeals is fully warranted on the facts disclosed by the record and the authorities applicable thereto.

1. In its commercial or trade usage a "puzzle" is not a "game". There was ample testimony in this case, which was not contradicted, that in the terminology of the trade a jig saw picture puzzle is not a game (R. 15, 23, 24, 25, 29, 35). There is abundant authority for the view that the words in question were used in the sense in which they were understood in the trade.

*Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321.

*Nix* v. *Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

*Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624, 629.

This rule was admirably stated in the *Philadelphia Storage Battery Co. case, supra,* as follows (p. 321):

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. The command here is directed to 'manufacturers, producers and importers' of the 'articles' named. It is, because of this, a fair inference that Congress spoke to them in their own language. This means that the phrases of the law are to be given the meaning they have in the trades concerned.
>
> "This brings it pretty close to a question of trade nomenclature or terminology."

This rule seems to have been followed by the Commissioner himself when he said in Article 53 of Regulations 46 (p. 3, *supra*):

> "The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as . . . games, and parts of games . . .*"

2. Apart from the question of commercial or trade usage, there are organic differences between "games" and "puzzles". These inherent differences are recognized in the dictionary definitions of the two words, which establish the fact that in its common and ordinary meaning a puzzle is not a game.

3. The decision of the Circuit Court of Appeals in the instant case is based in part upon the application of the well known doctrines *ejusdem generis* and *noscitur a sociis* which have been invoked in many decisions of this Court and other courts.

> *United States* v. *Nichols,* 186 U. S. 298, 300.
> *United States* v. *Baumgartner,* 259 Fed. 722.
> *Phez Co.* v. *United States,* 25 F. (2d) 1011, aff'd., *United States* v. *Phez Co.,* 28 F. (2d) 106.

The enumeration of articles taxable as games, in Article 55 of Regulations 46 (p. 3, *supra*), to wit:

> "ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, *etc.*",

is concrete evidence of the application of these doctrines by the Commissioner himself in defining the scope of the word "games". The abbreviation "etc." means, of course, "and others of the like kind" and is generally used when a number of individuals of a class have been specified, to indicate that more of the same sort might have been mentioned but for shortness are omitted.

4. The correctness of the decision in the case at bar is further borne out by the legislative history of the tax on "games and parts of games" as disclosed in the Congressional Committee Reports under the Revenue Acts of 1917, 1918 and 1932, which clearly reveal an intention to impose a tax upon such sporting goods and games as were specifically mentioned and those of *like character.* To illustrate, it is enough to refer

to the Report of the Senate Committee on Finance in connection with H. R. 4280, which became the Revenue Act of 1917 (Report No. 103, 65th Congress, 1st Session, Vol. I, Miscellaneous, No. 7249), which states, at page 11:

"TITLE VI. WAR EXCISE TAXES.

"Your committee felt certain that articles used in *certain amusement games,* such as tennis rackets, billiard and pool balls, billiard and pool tables, checker and chess boards, dice, etc., should bear a moderate tax of this character, and acting upon this principle has retained the gross-sales tax imposed by the House bill *upon these and certain like articles* . . ." (Italics ours.)

5. Assuming that there is any doubt as to the applicability of Section 609 of the 1932 Act to the articles in question, the failure of the Commissioner of Internal Revenue to tax jig saw puzzles or picture puzzles of the jig saw type as "games" under prior revenue laws well warrants the inference that this is the construction which should be placed upon those words as used in the Revenue Act of 1932. This Court has frequently held that where the meaning of a statute is doubtful, great weight will be given to the construction placed upon it by the department which is charged with its execution and that the reenactment of the statute without change is an adoption by Congress of a long continued prior executive construction.

*Robertson* v. *Downing,* 127 U. S. 607.
*United States* v. *Hermanos,* 209 U. S. 337.
*Komada & Co.* v. *United States,* 215 U. S. 392.
*United States* v. *Falk,* 204 U. S. 143, 152.

*Brewster* v. *Gage*, 280 U. S. 327, 337.
*National Lead Co.* v. *United States*, 252 U. S. 140.
*Edwards* v. *Wabash Railway Co.*, 264 Fed. 610.

The record in the case at bar discloses that from February 25, 1919 to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as "games" (R. 19). Nor were they taxed as "games" under the Revenue Act of 1917, which was in force from October 4, 1917 to February 25, 1919. The record further discloses that the provisions of the Revenue Acts of 1917 and 1918 imposing a tax on games were reenacted substantially without change in the Revenue Act of 1932 and that the administrative interpretation under which jig saw picture puzzles were not taxed was of long duration. The uncertainty and vacillation of the Commissioner, and his contradictory rulings both before and after his decision in S. T. 567, as shown by the record, and the decision of the Circuit Court, unquestionably present a situation which also distinguishes the case at bar from the ouija board case upon which the petitioner relies to establish a conflict.

If there were any doubt as to the applicability of Section 609 of the 1932 Act to jig saw picture puzzles, such doubt, in view of the foregoing, would have to be resolved in favor of the taxpayer, under the rule in *Gould* v. *Gould*, 245 U. S. 151. But, as was pointed out by the Court below (R. 62), under the circumstances of this case, there is "no reason for resorting to that expedient here".

6. Finally, it is submitted that the taxation of all

articles which furnish "sport, recreation or amusement" as "games" would lead to absurd results. There are many things besides "jig saw picture puzzles" which furnish sport, recreation, amusement or diversion, such as books, magazines, horses, automobiles, radios, phonographs, violins, pianos and other musical instruments, toys, such as microscopic outfits, magic material sets, railroad tracks and cars, paint, erector and skyscraper sets, building blocks, chemical, electrical and tool sets, etc., yet no one would call them games and they are obviously not taxable as games. Even the articles which are not subject to tax as sporting goods or games under Regulations 46, Article 56 (*supra*, p. 3), are designed to furnish sport, recreation, amusement or diversion. If the test of taxability of games and parts of games under Section 609 is whether the article is designed to furnish sport, recreation, amusement or diversion, there is no logical basis for differentiation between jig saw picture puzzles, on the one hand, and the articles specified in Regulations 46, Article 56, and the many articles enumerated in this paragraph, on the other.

7. The decision of the Circuit Court of Appeals in the case at bar is an application of the rule of primary adaptation and use which was adopted by this Court in *Universal Battery Co.* v. *United States*, 281 U. S. 580.[1]

The test in determining whether or not an article is taxable as a game is the same as that applied in deter-

[1] See, *accord*: *American Chain Co.* v. *Hartford-Conn. Trust Co.*, 11 F. Supp. 770 (D. C., D. Conn. 1931); *United Shoe Machinery Co.* v. *White*, 13 F. Supp. 97, 101; *Hygrade Food Products Corp.* v. *Chicago, M., St. P. & P. R. Co.*, 10 F. Supp. 767, 770; *Kamco, Inc.* v. *United States*, 10 F. Supp. 588, 591 (Ct. Cl., 1935); *Dalton & Balch* v. *United States*, 8 F. Supp. 727 (Ct. Cl., 1934), at page 729.

mining whether or not an article is an automobile part or accessory. It is not the use to which the article may be put, but the use for which the article is primarily intended and adapted. This rule of primary adaptation and use is followed by the Commissioner in Regulations 46, Article 56 (p. 3, *supra*). The articles therein exempted may all be used in a spirit of competition, yet they are not primarily adapted to or intended for such use.

With respect to the picture puzzles in controversy in the instant case, while they might be used by two or more persons in competition, they were unquestionably manufactured and primarily designed for the amusement of one person. The Court below ruled that jig saw picture puzzles are not designed for use in games of contest and that the putting together of a jig saw picture puzzle involved no competition and only one participant.

If the test of taxability is not primary adaptation and use, anything could be taxed as a game. Ordinary rope, for example, is used in a tug-of-war. In the familiar pie-eating contest, the element of competition does not make the pies subject to tax as games. Cross word puzzles are adapted to, and used in, competitive play, and they are not and never have been taxable as games. There is, in fact, an unreported ruling that cross word puzzles are not taxable as games (R. 18, 19, 31). It is accordingly submitted that the decision of the Court below was, in this aspect of the case, in harmony with the rule of primary adaptation and use.

The petitioner's statement also alludes to the possibility of competition against time in the solution of these puzzles. But this cannot be the test of taxability for competition against time applies as well to articles

which are not taxable as to those which are taxable under Section 609 of the Revenue Act of 1932. Two persons might match their speed in reading a book or knitting a sweater, yet the element of competition against time would not make the article used taxable as a "game". In the case of parallel bars, which are expressly exempt from taxation under Article 56 of Regulations 46, it is likewise possible to use them in a contest or competition against time, yet that possibility does not bring them within the scope of the statute. So in the case of cross word puzzles, the record shows that the object in their solution is to see who can do them the fastest (R. 31) and that there are no rules for their solution, yet they are not and never have been taxable as games. This difference in treatment by the Commissioner of jig saw picture puzzles, on the one hand, and cross word puzzles, on the other, does not lend itself to logical explanation.

It is therefore submitted that the decision of the Circuit Court of Appeals, under the circumstances of this case, is entirely correct and in accord with the well established rules of statutory construction.

### IV. THE CASE AT BAR PRESENTS NO ISSUE OF GENERAL IMPORTANCE.

Petitioner argues that the construction adopted by the Court below restricts the operation of the statute and casts doubt upon its application. It is submitted, however, that, if anything, the application of the statute is distinctly clarified and its scope clearly defined. If Congress desires to tax puzzles as a class, or jig saw picture puzzles alone, it is a simple matter for Congress to mention them in the list of articles subject to excise taxes. The courts will not condone the

adoption by the Commissioner of Internal Revenue of a construction of the statute which would amount to administrative legislation.

## CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals that the particular article sought to be taxed is a "puzzle" and not a "game" is correct and in accord with established precedent. The petitioner has had a careful review of his contentions and there does not exist any occasion for further review by this Court. There is no conflict of decisions nor even a conflict of reasoning. Nor is the question of taxability of jig saw or picture puzzles as games one of general importance, since Congress may amend the statute to impose a tax upon puzzles in the future, if it sees fit to do so. No broad or doubtful question of great moment is presented for settlement. It is accordingly submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1937.